90-218

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ISAAC FOGEL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the federal theft statute, 18 U.S.C. §641, may be extended to reach the act of cutting timber on government land where the trees were never taken from the government's possession?

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No. _____

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner, Isaac Fogel, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the

Fourth Circuit entered on April 4, 1990, affirming his conviction for violating Title 18, United States Code, §§2, 641 and 1852.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 901 F.2d 23 and is reprinted in the appendix hereto. App.1a.

JURISDICTION

Petitioner's conviction under 18 U.S.C. §§2, 641 and 1852 was affirmed by the Fourth Circuit on April 4, 1990. App.1a. His timely petition for rehearing, with a suggestion for rehearing en banc, was denied by the Court on May 7, 1990. App. 18a. The jurisdiction of this Court to review the

judgment of the Fourth Circuit is timely invoked under 28 U.S.C. §1254(1) and Rule 13.1.

PERTINENT STATUTORY PROVISIONS

The full texts of Title 18, United States Code, §§641 and 1852, are reprinted in the appendix. App. 25a-26a. In pertinent part, 18 U.S.C. §641 provides as follows:

> Whoever embezzles, steals, purloins, or knowingly converts to his own use or to the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof * * * [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both * * *.

In pertinent part, 18 U.S.C. §1852 provides:

> Whoever cuts or wantonly destroys any timber growing on the

> public lands of the United States * * * [s]hall be fined not more than $1,000 or imprisoned not more than one year, or both * * *.

STATEMENT OF THE CASE

Petitioner was charged under a two-count indictment in the District of Maryland. After a six-day jury trial he was convicted on one count of cutting timber growing on public land owned by the United States, a misdemeanor violation of 18 U.S.C. §1852. He was also convicted on another count accusing him of converting government property consisting of the trees which had been cut down on public land, a felony violation of 18 U.S.C. §641. The district court had jurisdiction of the charges by virtue of 18 U.S.C. §3231.

In 1982, Petitioner and his wife purchased real estate in Potomac, Maryland, consisting of four wooded acres and the dwelling house in which they now reside (J.A.198). The property is fairly level but, at a point 150 feet from the house, ultimately gives way to a precipitous scope leading downward to the Chesapeake and Ohio Canal (J.A.265-66). The Potomac River lies beyond the Canal. Petitioner's property is separated from the Canal by a narrow strip of parkland (about 50-feet wide) owned in fee by the United States, which forms part of the Chesapeake and Ohio Canal National Historical Park (J.A.48-49).

Cutting of trees within the Historical Park is forbidden. Tree-cutting is also restricted by the terms of a scenic easement acquired by the United States, which extends

beyond the Park boundary across adjoining portions of the property owned by the Petitioner and his wife (J.A.43-50).

On August 30, 1988, Petitioner was charged in a two-count indictment with violating 18 U.S.C. §§641 and 1852. The indictment alleged that on or about March 2, 1985, a tree-cutting service hired by Petitioner cut down, at his direction, 126 trees and saplings on land within the Historical Park.[1] App. 22a. It alleged

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[1] The indictment also alleged that 12 more trees were cut down upon that part of Petitioner's own land which was subject to the scenic easement. App. 22a. At trial, upon the government's concession, the district court instructed the jury that Petitioner could not be convicted for cutting trees on his own property in violation of the easement restrictions (J.A. 393). Although the Fourth Circuit opinion apparently overlooked that disclaimer in its recitation of the facts (App. 4a, 6a), the jury presumably followed the instructions and confined its verdict to the tree-cutting on public land.

that the trees were cut down so as to improve Petitioner's view of the Potomac River and enhance the value of his property. App. 22a. One count charged that Petitioner, in violation of §1852, did cut and wantonly destroy timber growing on the public lands of the United States. App. 24a. The other count, charging him under 18 U.S.C. §641, alleged that Petitioner did knowingly convert and did, without authority, dispose of a thing of value of the United States, "to wit: 126 trees and saplings, more or less, which had been cut down on lands owned by the United States." App. 23a. Petitioner entered pleas of not guilty to both counts.

Trial began February 6, 1989. The chief government witness was Gary Ralph,

whose tree-cutting service had been hired to trim tree limbs, cut bamboo, and remove underbrush located upon Petitioner's property (J.A. 84, 286). It was undisputed that, after a full day working on Petitioner's property, Ralph's work crew returned the next day, ventured across the Park boundary, and cut down approximately 100 trees and saplings growing on public land (J.A. 129-161).

The testimony was in sharp conflict over Petitioner's culpability. Ralph testified that his crew had finished work on Petitioner's property by twilight on the first day, when he encountered Petitioner and was ordered by him to cut trees all the way down to the Canal (J.A. 90-91). Petitioner denied giving any such instructions. According to his testimony,

before the work began, Petitioner told Ralph not to go beyond the Park boundary and refused him permission to cut down any trees, on or off his property (J.A. 283-84, 289). Petitioner was away on a week-long California business trip at the very moment that he supposedly ordered Ralph to cut down trees (J.A. 295-97). He testified that he was unaware of the unauthorized cutting until he returned to Maryland (J.A. 296-97).

In contrast, the evidence was undisputed that the trees cut down by Ralph's crew were not removed from the Park property. The government's own witnesses agreed that the trees cut down on the public land were left undisturbed where they fell (J.A. 94, 147, 174, 177). Having been cut down, the trees remained at all times in the government's possession upon its own land.

The district court denied Petitioner's motion for judgment of acquittal (J.A. 183-85), as renewed at the close of the evidence (J.A. 377-78). On February 15, 1990, the jury found Petitioner guilty on both counts (J.A. 23). On the §641 count, he was sentenced to a three-year term of imprisonment (all but 15 days of which was suspended), placed on two years' probation, fined $20,000, ordered to perform 300 hours of community service, and directed to make restitution (J.A. 24). On the §1852 count, Petitioner received a concurrent sentence of six months' imprisonment and a $5,000 fine, execution of which was suspended (J.A. 24). He filed timely notice of appeal. J.A. 27.

The Fourth Circuit affirmed Petitioner's conviction on both counts. App. 3a. It rejected his contention that the

conviction under 18 U.S.C. §641 should be reversed for lack of evidence that the Petitioner converted to his use any of the trees which had been cut down on government land. The Fourth Circuit upheld his §641 conviction on the ground that Petitioner "cut down trees * * * to enhance his view and hence the value of his property, substantially and criminally interfering with the government's use of that property." App. 12a.

ARGUMENT

THE ACT OF CUTTING TIMBER GROWING ON PUBLIC LANDS OF THE UNITED STATES IS A VIOLATION OF 18 U.S.C. §1852. HOWEVER, UNLESS THE GOVERNMENT IS DEPRIVED OF POSSESSION OF THE TREES, THERE IS NO BASIS FOR A CONVICTION UNDER 18 U.S.C. §641.

This case presents an important issue of federal criminal law which has not been, but should be, settled by this Court. The decision below stands in conflict with decisions of the Ninth Circuit to the effect that timber-cutting on public land is not an offense under 18 U.S.C. §641, unless the government is deprived of its possession of the trees. This conflict was not addressed by the Fourth Circuit or even acknowledged in its opinion. In addition, while denouncing the theft or conversion of government property, 18 U.S.C. §641 has

never before been held to apply to trespasses against the real property of the United States. In that respect, the decision below also appears to be in conflict with the principles of Morissette v. United States, 342 U.S. 246 (1952).

1. The extension of the federal theft statute to encompass the cutting of trees on government land is a rather startling development which leaves 18 U.S.C. §641 without apparent limits. That statute provides that any person who "embezzles, steals, purloins, or knowingly converts to his use or the use of another" money or property of the United States, with a value greater than $100, is guilty of a felony. As the Fourth Circuit observed, a §641 conviction "does not require that the accused actually keep the property for

personal use." App. 11a. However, the Fourth Circuit did not stop there. Under its holding, a §641 conviction does not even require that the accused come into possession of government property.

This radical extension of the reach of 18 U.S.C. §641 enabled the Fourth Circuit to sustain the conviction upon a charge for which Petitioner was not even indicted. The indictment did not advance the theory, adopted by the Fourth Circuit, that Petitioner converted government property by cutting down trees growing on public land. Instead, Petitioner was accused of converting "126 trees and saplings, more or less, which had been cut down on lands by the United States." App. 7a, 23a (emphasis added). The indictment did not purport to make the "conversion of standing timber a

violation of §641," but, on the contrary, alleged the conversion of severed timber (and therefore personal property). United States v. Lamb, 150 F.Supp. 310, 314n.2 (N.D.Cal. 1957) (emphasis in original), aff'd sub. nom. Magnolia Motor & Logging Co. v. United States, 264 F.2d 950 (9th Cir. 1959).[2]

Wholly apart from the indictment in this case, the Fourth Circuit's interpretation of 18 U.S.C. §641 warrants

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[2] The jury was instructed (in the language of the indictment) that conviction upon the §641 count depended upon a finding that Petitioner converted the trees and saplings "which had been cut down on lands owned by the United States" (J.A. 393). The Fourth Circuit substituted its own theory that the conversion offense consisted of cutting down the trees. This was impermissible: "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process." Dunn v. United States, 442 U.S. 100, 106 (1979).

review by this Court. Never before has a conviction been upheld under §641 on the theory that standing timber was converted merely by cutting it down. In this respect, the holding below stands in conflict with Ninth Circuit decisions which distinguish between the offense of cutting timber (as defined by 18 U.S.C. §§1852 and 1853) and the theft or conversion of trees (proscribed by §641):

> Section 641 applies only to the stealing or conversion of personalty belonging to the United States, whereas §1852 becomes applicable when the act of cutting, destroying or removing timber growing on the public lands of the United States is committed * * *. It is fundamental that standing timber * * * is classified as realty * * *; hence §641 (relating to personalty) could not be applied.

United States v. Lamb, supra, 150 F.Supp. at 313 (court's emphasis; citations omitted).

The Ninth Circuit affirmed the Lamb convictions because the government's proof showed that the trees were stolen or converted after being cut down: "The evidence showed that the logs were made from trees after the trees were cut and felled; that the cutting and felling of the trees, the making of the logs and the theft and conversion thereof were distinct, separate and independent acts; and that therefore the logs were personal property." Magnolia Motor & Logging Co. v. United States, supra, 264 F.2d at 954.

Subsequent Ninth Circuit decisions adhere to the Lamb-Magnolia distinction between the act of cutting standing timber and the theft or conversion of the severed trees. See, e.g., United States v. Petersen, 777 F.2d 482, 484 (9th Cir. 1985);

United States v. Gemmill, 535 F.2d 1145, 1150 (9th Cir. 1976); United States v. Cedar, 437 F.2d 1033, 1035-36 (9th Cir. 1971); United States v. Manes, 420 F.Supp. 1013, 1019n.9 (D.Or. 1976), aff'd 549 F.2d 809 (9th Cir. 1977). In addition, the Tenth Circuit observes the Lamb-Magnolia distinction. United States v. Larsen, 596 F.2d 410, 411 (10th Cir. 1979). Under that distinction, Petitioner could be convicted "under §641 only for the removal of timber already cut, not for the cutting itself." United States v. Manes, supra, 420 F.Supp. at 1019n.9.

Congress specifically imposed punishment for the act of the tree-cutting as a misdemeanor under 18 U.S.C. §1852. It is inconceivable that Congress also intended to punish the very same act of tree-cutting,

without more, as a larceny-type felony under 18 U.S.C. §641. Because the decision below is the only precedent for such treatment, the Court should grant the writ in order to resolve the inter-circuit conflict.

2. The decision of the Fourth Circuit extends the reach of 18 U.S.C. §641 in order to protect the government as a landowner. Its opinion upholds the §641 conviction on the ground that Petitioner "cut down trees valued in excess of $30,000 to enhance his view and hence the value of his property, substantially and criminally interfering with the government's use of that property." App. 12a (emphasis added; footnote omitted). This passage suggests the conclusion that, by cutting down trees, Petitioner was

interfering with the government's use of growing upon public land.[3]

At common law the mere cutting of growing timber, while regarded as a trespass to real estate, was never treated as larceny or conversion of property. Land itself cannot be the subject of larceny or conversion. Standing timber is a constituent element of the land itself.

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[3] Read literally, this passage from the opinion below could be interpreted as meaning that, by enhancing the value of "his property", Petitioner interfered with the government's use of "that property". App. 12a. We assume that the Fourth Circuit intended no such interpretation. Manifestly, a person cannot be convicted under §641 for conversion of his own property: "There is no rational basis for extending section 641 to a situation in which the 'thing of value' is actually the property of the alleged converter." United States v. Kristofic, 847 F.2d 1295, 1297 (7th Cir. 1988) ("axiomatic that conversion must involve the property of another, not the property of the defendant").

United States v. Shoshone Tribe of Indians, 304 U.S. 111, 116 (1938). While still attached to the soil, trees cannot be the subject of larceny-related offenses at common law. When severed from the realty, however, trees become personal property subject, as such, to protection from larceny-related offenses.

In the history of the common law, the act of severance always has been regarded as separate and distinct from acts constituting larceny or conversion. The unauthorized cutting of timber on the public lands of the United States is unquestionably an illegal trespass. Northern Pac. R. Co. v. Lewis, 162 U.S. 366, 378 (1896). However, the wrongful cutting of timber on public land is not larceny because it does not interfere

with the government's possession of the trees:

> Standing timber is a part of the realty, and goes with its title or right of possession. When severed from the soil, its character as realty is changed; it has become personalty, but the title to it continues as before.

Northern Pac. R. Co. v. Paine, 119 U.S. 561, 564 (1887). After severance, so long as the trees remain upon its land, the United States retains the actual possession of such property. Northern Pac. R. Co. v. Lewis, supra, 162 U.S. at 378-79. In that situation, as here, the trespasser acquires neither actual nor constructive possession of the severed property. Id., at 382.

There can be no basis for imputing to Congress any intent to bring standing timber, as a form of real estate, within the protection of 18 U.S.C. §641. Such a

dramatic alteration of the common law concepts of larceny and conversion would not have eluded notice by this Court when it undertook meticulous review of §641 and its legislative history. The Court concluded that §641, as enacted, "was not intended to create new crimes but to recodify those then in existence." Morissette v. United States, 342 U.S. 246, 266n.28 (1952). The "conversion" of standing timber never was a common law crime. It did not become a crime by enactment of §641.

3. The Fourth Circuit decision invites a departure from "traditional" common law applications. Its opinion declares:

> * * * The modern tendency, codified in Section 641, is to broaden the offense of conversion to include intentional and knowing abuses or unauthorized uses of government property but which does not fit within the traditional

> common law definition of conversion. Morissette v. United States, 342 U.S. 246, 266-68, n.28. See also United States v. Hill, 835 F.2d 759, 763-64 (10th Cir. 1987) (section 641 now covers myriad trespasses against government property).

App. 11a.

We submit that the Fourth Circuit has misinterpreted this Court's decision in Morissette, as well as the scope of 18 U.S.C. §641. Congress did employ common law terms in the text of §641. Its use of such terms "may be taken as satisfaction with widely accepted definitions, not a departure from them." Morissette v. United States, supra, 342 U.S. at 263. See United States v. Turley, 352 U.S. 408, 411 (1957).

The Fourth Circuit cites a "modern tendency" to "broaden the offense of conversion" (App. 11a), but this is a dangerous "tendency" for Article III courts

to undertake without legislative sanction. The scope of 18 U.S.C. §641 cannot be "broadened" in defiance of the common law antecedents which supply this criminal statute with its very meaning. As Judge Posner has said in this context, it is wrong "to apply section 641 not in a way which merely extends or reinforces the underlying common law concepts but in a way which flatly contradicts the common law." United States v. Kristofic, 847 F.2d 1295, 1297 (7th Cir. 1988).

Moreover, as a matter of legislative history, the expansion of this 41-year old statute is utterly unnecessary. The unlawful cutting of trees on public lands of the United States is a subject on which Congress has legislated many times since the earliest days of the Republic. It became a

specific offense as early as 1831.[4] Whenever Congress has sought to protect the public lands by criminalizing the cutting of trees, it has stated its intent directly and has treated the offense consistently as a misdemeanor. See, e.g., 16 U.S.C. §§551, 606; 18 U.S.C. §§1852, 1853, 1854. Indeed, Petitioner stands convicted of violating 18 U.S.C. §1852 by cutting timber growing on the public lands of the United States.

Congress did not authorize federal prosecutors to create yet another tree-cutting offense by stretching 18 U.S.C. §641 beyond its intended purpose in order to obtain felony convictions. That statute is not an environmental measure. It does not regulate the use of public lands.

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[4] See English v. United States, 116 Fed. 625, 626-27 (9th Cir. 1902).

The function of 18 U.S.C. §641 was to codify "larceny-type offenses". Morissette v. United States, 342 U.S. 246, 261 (1952). By its own terms, §641 condemns anyone who "embezzles, steals, purloins, or knowingly converts" any "thing of value" of the United States. The statutory words, "embezzles, steals, purloins, or knowingly converts" are used "in the same connection, and as applicable to the same persons and to the same property." Moore v. United States, 160 U.S. 268, 273 (1895) (emphasis added). In other words, the statute protects any and all government property which is capable of being embezzled, stolen, purloined, or converted. Standing timber does not fit that description.

The legislative history of 18 U.S.C. §641, explored at length in Morissette, 342

U.S. at 266-69n.28, fails to disclose any major innovations in the definition of "larceny-type" offenses. This Court found no other purpose in the enactment "than to collect from scattered sources crimes so kindred as to belong in one category." Id., at 266. "Stealing, larceny, and its variants and equivalents," id, at 260, all dealing with property capable of possession, were thus placed into a single category. In enacting §641, Congress was aware that "stealing", among other offenses, denotes "the criminal taking of personal property either by larceny, embezzlement, or false pretenses." United States v. Turley, 352 U.S. 407, 412 (1957) (emphasis added).[5]

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[5]Other courts have observed that 18 U.S.C. §641 is designed to protect the United States in its possession of personal property. United States v. Barlow, 470 F.2d 1245, 1251 (D.C.Cir. 1972); Magnolia Motor &

The concept of "knowing conversion" is thus aimed at protecting the government in its possession of personal property. It is joined with other offenses in 18 U.S.C. §641 which unquestionably entail the possession of the property. In order to convict under §641, as this Court concluded in Morissette, there must be "an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, wrongfully to deprive another of possession of property." Id., 342 U.S. at 276 (emphasis in original.)[6]

Logging Co. v. United States, 264 F.2d 950, 954 (9th Cir. 1959). See United States v. Kehoe, 365 F.Supp. 920, 923 (S.D.Tex. 1973) (dismissing indictment charging embezzlement of land).

[6] The only decision cited by the Fourth Circuit in support of its conclusion, apart from Morissette, was United States v. Hill, 835 F.2d 759 (10th Cir. 1987). The Hill decision actually reinforces Petitioner's

The decision below does not suggest that the Petitioner deprived the government of its possession of the trees in question. Therefore, he was convicted for conduct beyond the scope of 18 U.S.C. §641. We respectfully submit that the decision below is an unwarranted and unprecedented extension of §641 beyond its historic purposes, and deserves review by this Court.

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contention that all §641 offenses (including conversion) are crimes against the possession of property: "The distinction between stealing and conversion turns on how possession is obtained. One who gains possession of property by wrongfully taking it from another steals. Morissette, 342 U.S. at 271, 72 S.Ct. at 254. One who comes into possession of property by lawful means, but afterwards wrongfully exercise dominion over that property against the rights of the true owner, commits conversion. Morissette, 342 U.S. at 272, 72 S.Ct. at 254 * * *." United States v. Hill, supra, 835 F.2d at 764 (emphasis added).

CONCLUSION

For each of the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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August 1, 1990

APPENDIX

PUBLISHED

UNITED STATES OF AMERICA
FOR THE FOURTH CIRCUIT

No. 89-5112

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ISAAC FOGEL,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (CR-88-289-JH)

Argued: December 7, 1989
Decided: April 4, 1990

Before RUSSELL and WILKINSON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge Russell wrote the opinion, in which Judge Wilkins [sic] and Senior Judge Butzner joined.

Albert David Brault (Janet S. Zigler, BRAULT, GRAHAM, SCOTT & BRAULT, on brief); Harley Thomas Howell (James A. Johnson, SEMMES, BOWEN & SEMMES, on brief) for Appellant. David Paul King, Assistant United States Attorney (Breckinridge L. Willcox, United States Attorney, on brief) for Appellee.

RUSSELL, Circuit Judge:

Following a six-day trial by jury, the appellant, Isaac Fogel, was convicted of converting government property, in violation of 18 U.S.C. §641, and cutting timber growing on public lands of the United States, in violation of 18 U.S.C. §1852. He was found guilty on both counts and sentenced to fifteen days' confinement in a halfway house, fined $20,000, ordered to perform 300 hours of community service, and ordered to make restitution for the government property destroyed. This appeal followed. We affirm.

I.

The appellant was the owner of a piece of property in Maryland's Potomac River Valley, the value of which would be vastly

increased had it a view of the river. Unfortunately for the appellant, between his property and the river lay the C & O Canal National Historical Park. Further, his property was subject to certain timbering restrictions by way of easement, duly recorded, in favor of the United States. This easement prohibited Fogel from cutting down any tree growing on his property that measured in excess of six inches in diameter at breast height.

Although both he and his wife had been fully apprised by officers of the United States National Park Service that to do so would be both illegal and a detriment to a unique environment, the appellant resolved to fell trees on his property as well as on federal land in order that he might improve his view and hence the value of his

property. To such an end, the appellant contacted Suburban Tree Service about performing removal services behind his house. Gary Ralph, owner of Suburban Tree Service, and Michael Looney, an employee, then visited the Fogel site and agreed to remove undergrowth and limbs from the larger trees for a fee of $650. At trial, Ralph testified that he was never told nor was he ever aware of the easement or the park boundary and believed the entire property to belong to the appellant. After a full day of work, the appellant, Ralph, and Looney met to discuss the work completed. At that time the appellant expressed displeasure with the job because not enough timber and brush had been cut. At the direction of the appellant, Ralph's crew returned the next day and cut down approximately 100 trees

located on national park land and 12 trees over six inches in diameter, and hence protected by the easement, on the appellant's property.[1] Thereafter, a park ranger discovered the cutting and this indictment ensued.

II.

The appellant first contends that count one of the indictment, charging him with violating the provisions of 18 U.S.C. §641, was fatally defective in that it failed to allege that he acted with specific intent to convert to his use or to dispose of the government property described therein.

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[1] Fogel asserted at trial that during the course of the timbering he was in California and made no contact with Ralph about the job. The jury rejected this assertion, and we find no occasion now to disturb the finding of the jury based on this continuing assertion.

The language of 18 U.S.C. §641 provides in relevant part that:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof [shall be guilty of an offense].

In count one of its indictment, the government charged, inter alia, that the appellant "did knowingly convert and did, without authority, dispose of a thing of value of the United States to wit, . . . 126 trees and saplings, more or less, which had been cut down on lands owned by the United States."

Because the appellant's objection to this indictment was made after the jury

rendered its verdict, any review for alleged defect is to be reviewed, if at all, under a liberal standard and "every intendment is . . . indulged in support of the sufficiency." Finn v. United States, 256 F.2d 304, 306-07 (4th Cir. 1958).[2] Here, the indictment simply mirrored the language of the statute in setting forth the offense charged, and charged both a criminal act and a criminal intent.

An indictment that tracks the statutory language is ordinarily valid. Fed. R. Crim. P. 7; United States v. American Waste Fibers Co., 809 F.2d 1044 (4th Cir. 1987). One of

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[2]When an objection to the sufficiency of an indictment is made after verdict, review is left to the discretion of the appellate court. See United States v. Wabaunsee, 528 F.2d 1, 2 (7th Cir. 1985). See also United States v. Hooker, 841 F.2d 1225 (4th Cir. 1988); United States v. Pupo, 841 F.2d 1235 (4th Cir.) cert. denied, ___ U.S. ___ (1988).

the principal purposes of an indictment is to apprise the accused of the charge or charges leveled against him so he can prepare his defense. See United States v. Miller, 471 U.S. 130 (1985). The indictment here is sufficiently detailed to serve this purpose, and the appellant's contention that the language fails to allege specific intent is simply an awkward attempt to fabrication issue for appeal. Although the indictment did not employ the word "intentionally," the word "knowingly," an adverb of similar import and context, and the word found in the statute, did appear. We find the distinction between the two words to be inconsequential and find no authority to suggest that failure to draft the indictment to include the word "intentionally" renders that indictment infirm. The use of either

term to describe the criminal mind of the appellant would have been sufficient to inform the appellant of the charge against him. Here, the government chose the word "knowingly" to describe the appellant's purposeful activity. Therefore, the indictment brought against the appellant is complete in that it charges each element of the predicate offense, both actus reus and mens rea, giving appellant full notice of the charge against which he must defend.[3]

III.

The appellant next asserts that the evidence was insufficient to support a verdict of guilty under 18 U.S.C. §641.

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[3] In view of our ruling the government's motion to supplement the record becomes moot, and we therefore dismiss the motion.

Specifically, the appellant asserts that there is no evidence that he converted the trees to his own use. The law of Section 641 stands contrary to such an assertion. Conversion under Section 641 does not require that the accused actually keep the property for personal use. The modern tendency, codified in Section 641, is to broaden the offense of conversion to include intentional and knowing abuses or unauthorized uses of government property but which do not fit within the traditional common law definition of conversion. Morissette v. United States, 342 U.S. 246, 266-68, n. 28. See also United States v. Hill, 835 F.2d 759, 763-64 (10th Cir. 1987) (section 641 now covers myriad trespasses against government property).

The evidence in this case is clear. The appellant cut down trees valued in excess of $30,000 to enhance his view and hence the value of his property,[4] substantially and criminally interfering with the government's use of that property. We hold this to be sufficient to sustain the conviction under Section 641.

IV.

After the criminal indictment was brought against the appellant, he filed a civil suit in Maryland state court against Gary Ralph and Suburban Tree Service, alleging that Ralph was in breach of contract, had slandered and libeled him by

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[4] According to the testimony of one expert government witness, the cutting of the trees nearly doubled the value of the Fogel estate.

making false statements to federal authorities, and was responsible for indemnifying him for the outcome of the cutting. Appellant's criminal counsel, Joshua Treem, drafted the civil complaint and represented him during the discovery phase of the civil matter. During the criminal trial, the government introduced into evidence (without objection) the civil complaint to impeach the appellant, as several allegations in the civil suit were inconsistent with his trial testimony. To combat the effects of such impeachment, the appellant made an attempt to call Treem to the stand to explain the drafting of the complaint and any inconsistencies found therein. Upon objection from the government, the district court refused to

allow defense counsel to testify. The court then also denied a motion for a mistrial.

By filing the civil complaint in advance of his criminal trial, the appellant was afforded the rare opportunity of deposing those who may testify against him in advance of trial and then using the deposition testimony for impeachment purposes, which he did. Unfortunately for the appellant, this strategy worked to his detriment, as the prosecution was also able to use documents filed in that suit against him. As a court of appeals, we are here without authority or inclination to soften the blow on a criminal defendant when an accepted, if not ill-advised, strategy backfires.

The question of whether an attorney is competent to testify is committed to the

discretion of the district court, subject to the normal review for abuse. United States v. Nyman, 649 F.2d 208, 211 (4th Cir. 1980). Courts have generally frowned on such testimony as a violation of Disciplinary Rule 5-102(A) of the American Bar Association's Code of Professional Responsibility. However, when the testimony is important and no other witness would be able to supply it, then such testimony may be allowed. Universal Athletic Sales Co. v. American Gym Recreational & Athletic Equipment Corp., 546 F.2d 530, 539 (3d Cir.) cert. denied, 430 U.S. 984 (1977).

Here, the appellant was competent to testify as to these inconsistencies, and in fact did. We therefore find no abuse of discretion in the district court's decision to exclude Treem, for to have put him on the

stand may have unduly influenced the jury and unnecessarily disrupted the proceeding. Accord Nyman, supra.

We believe any abuse of discretion, if extant at all, is to be found on the part of Treem, who, knowing it to be likely that he would be called as a witness in this case, did not withdraw his services as attorney for the defense.

The judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
May 7, 1990

No. 89-5112

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ISAAC FOGEL

Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Russell with the concurrence of Judge Wilkinson and Judge Butzner.

For the Court,

John M. Greacen
CLERK

IN THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

	* CRIMINAL NO.:
	* JH-88-0289
	*
	* (Conversion and
UNITED STATES OF AMERICA	* Disposition of
	* Property of the
v.	* United States, 18
	* U.S.C. §641;
ISAAC FOGEL	* Timber Removed or
	* Transported, 18
	* U.S.C. §1852;
	* Aiding & Abetting
	* 18 U.S.C. §2)

* * * * * * *

INDICTMENT

The Grand Jury for the District of Maryland charges:

1. In 1982, Isaac Fogel and his wife, Jo Benson Fogel, acquired a property in Potomac, in the State and District of Maryland. The property borders the Chesapeake and Ohio Canal (the "C&O Canal")

within the Chesapeake and Ohio Canal National Historical Park.

2. Between the C&O Canal and the border of the Fogel property, lies a strip of land within the National Historical Park owned by the United States of America (the "Fee Property"). Cutting of trees within the Fee Property is forbidden.

3. Prior to 1982, the United States acquired a senic [sic] easement on real estate bordering the Fee Property and the C&O Canal, including the property purchased by the Fogels (the "Senic [sic] Easement Property"). The Senic [sic] Easement Property runs inland from the C&O Canal, overlapping the Fee Property and terminating at a point 200 feet from the C&O Canal prism.

4. The senic [sic] easement prohibits cutting of timber larger than six inches diameter at breast height, with certain exceptions not relevant to this matter.

5. During February and March 1983, Isaac Fogel and Jo Benson Fogel met with various officials of the National Park Service to discuss the Fogel property. These discussions concerned the boundaries of the Fee property and the Senic [sic] Easement Property, as well as the terms and conditions of the senic [sic] easement, including those governing the cutting of timber.

6. In December 1984, Isaac Fogel and Jo Benson Fogel had the Fogel property surveyed. The survey clearly showed the boundaries of the Fee Property and of the Senic [sic] Easement Property.

7. On or about March 2, 1985, Isaac Fogel hired Suburban Tree Service to cut trees on the property, and walked the property with Suburban Tree Service, issuing instructions to cut down trees so that Fogel would have a good view of the Potomac River.

8. At Isaac Fogel's direction, Suburban Tree Service cut down 126 trees, more or less, within the Fee Property.

9. At Isaac Fogel's directions, Suburban Tree Service cut down 12 trees, more or less, in excess of six inches diameter at breast height within the Senic [sic] Easement Property.

10. The total value of the trees that were cut down exceeded $30,000.

11. Subsequent to the cutting of the trees, Isaac Fogel and Jo Benson Fogel

listed for sale their property, describing it as having a "river view".

12. On or about March 2, 1985, in the State and District of Maryland,

ISAAC FOGEL

did knowingly convert and did, without authority, dispose of a thing of value of the United States and of the National Park Service, a department and agency thereof, to wit: 126 trees and saplings, more or less, which had been cut down on lands owned by the United States.

18 U.S.C. §641
18 U.S.C. §2

COUNT TWO

And the Grand Jury for the District of Maryland further charges:

1. Paragraphs 1 through 11 of Count One are incorporated as if fully set out.

2. On or about March 2, 1985, in the State and District of Maryland,

ISAAC FOGEL

did cut and wantonly destroy, timber growing on the public lands of the United States.

18 U.S.C. §1852
18 U.S.C. §2

/s/
BRECKINRIDGE L. WILLCOX
United States Attorney

A TRUE BILL

/s/
Foreperson

Statutory Provisions

Title 18, United States Code:

§641 Public money, property or records.

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever received, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted--

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

§1852 Timber removed or transported.

Whoever cuts, or wantonly destroys any timber growing on the public lands of the United States; or

Whoever removes any timber from said public lands with intent to export or to dispose the same; or

Whoever, being the owner, master, pilot, operator, or consignee or any vessel, motor vehicle, or aircraft or the owner, director, or agent of any railroad, knowingly transports any timber so cut or removed from said lands, or lumber manufactured therefrom --

Shall be fined not more than $1,000 or imprisoned not more than one year, or both.

This section shall not prevent any minor or agriculturist from clearing his land in the ordinary working of his mining claim, or in the preparation of his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; nor shall it interfere with or take away any right or privilege under any existing law of the United States to cut or remove timber from any public lands.

(2)

No. 90-218

In the Supreme Court of the United States

OCTOBER TERM, 1990

ISAAC FOGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Acting Assistant Attorney General

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QUESTION PRESENTED

Whether petitioner, who cut down trees on public lands to improve the view from his property, was properly convicted of converting to his use a "thing of value of the United States" under 18 U.S.C. 641.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-218

ISAAC FOGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 901 F.2d 23.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1990. A petition for rehearing was denied on May 7, 1990. Pet. App. 17a-18a. The petition for a writ of certiorari was filed on August 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for District of Maryland, petitioner was con-

victed of converting government property, in violation of 18 U.S.C. 641; and cutting timber growing on the public lands of the United States, in violation of 18 U.S.C. 1852. He was sentenced to 15 days' confinement in a halfway house and ordered to perform 300 hours of community service. He was also fined $20,000 and ordered to make restitution for the destroyed government property.

1. Petitioner owned a house and surrounding property in Maryland's Potomac River Valley, the value of which would nearly double if it had an unobstructed view of the Potomac River. Between petitioner's property and the river, however, lay the C&O Canal National Historic Park, created by Congress in 1971 in order to preserve the wooded area as it had appeared during the time the C&O Canal Company operated the canal. In addition, the United States had obtained in 1977 a scenic easement over petitioner's property that restricted the landowner from cutting down any tree measuring in excess of six inches in diameter at breast height. Petitioner and his wife purchased the property, subject to the easement, in 1982. They were repeatedly informed by National Park Service officials that it would be both illegal and a detriment to a unique environment to cut down trees subject to the easement or within the C&O National Historic Park. Pet. App. 3a-4a, 12a n.4; Gov't C.A. Br. 3-5, 9.

To enhance the value of his property, petitioner nevertheless decided to create a clearing to give the property a view of the Potomac River. In February 1985, he hired Suburban Tree Service to do the work. Petitioner did not tell Gary Ralph, the owner of Suburban Tree Service, about the scenic easement or the boundary line of the C&O Canal National Historic Park, and Ralph believed that the entire area

behind the house belonged to petitioner. Pet. App. 4a-5a; Gov't C.A. Br. 5-7.

After one day's work by Ralph and a crew of four workers, petitioner expressed displeasure because the area was not adequately cleared. He told Ralph that he wanted a good view of the river and directed the crew to cut all the way down to the canal. After petitioner declined to increase his payment for the tree-cutting service, he and Ralph agreed that the crew could leave the cut trees where they fell. Pet. App. 5a; Gov't C.A. Br. 7. Ralph and his crew returned the next day to complete the job. Following petitioner's directions, the crew cut down and left approximately 100 trees within the boundaries of the C&O Canal National Historic Park. They also cut down and left 12 trees on petitioner's property that were subject to the scenic easement. Pet. App. 5a-6a; Gov't C.A. Br. 7-9. An expert witness testified that the replacement value of the trees was in excess of $30,000 and that the natural scene destroyed by cutting down the trees would take approximately 35 years to recreate. Gov't C.A. Br. 9-10.

2. The court of appeals affirmed. Pet. App. 1a-16a. It rejected petitioner's contention that the evidence was insufficient to sustain a conviction under 18 U.S.C. 641 because there was no evidence that petitioner had converted the trees to his own use. Pet. App. 10a-12a. Relying on *Morissette* v. *United States*, 342 U.S. 246 (1952), the court explained that "[c]onversion under Section 641 does not require that the accused actually keep the property for personal use," and that conversion includes "intentional and knowing abuses or unauthorized uses of government property." Pet. App. 11a. The court held that the evidence was sufficient to sustain petitioner's conviction, since "[he] cut down trees valued in excess

of $30,000 to enhance his view and hence the value of his property, substantially and criminally interfering with the government's use of that property." Pet. App. 12a (footnote omitted).[1]

ARGUMENT

Petitioner contends that his conviction under 18 U.S.C. 641 should be reversed because his act of cutting down trees on public lands without depriving the government of possession of the felled trees does not constitute an offense under that Section. Pet. 12-30.

1. The court of appeals correctly concluded that petitioner's act of cutting down the trees located in the C&O Canal National Historic Park constituted a knowing conversion under 18 U.S.C. 641 because it "substantially and criminally interfered with the government's use of that property." Pet. App. 12a. Petitioner's contention to the contrary (Pet. 19-23, 27-30) rests on the premise that the scope of Section 641 is limited by the common law definitions of larceny-type offenses, which were restricted to the theft of personal property. This view further depends on a distinction between standing timber, which the common law considered real property, and severed timber, which the common law considered personal property. Under petitioner's theory, since only the former —standing timber or "real property"—was at issue here, Section 641 cannot apply.

Like the difference in offenses that depended on the determination whether and by whom timber had been

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[1] We agree with petitioner (Pet. 20 n.3) that the court of appeals evidently meant that petitioner substantially and criminally interfered with the government's use of its own property.

cut, the distinction between the character of timber as "real" or "personal" property is "subtle and illogical." *United States* v. *Gemmill*, 535 F.2d 1145, 1149-1150 (9th Cir.), cert. denied, 429 U.S. 982 (1976). By its plain terms, Section 641 is not limited by such distinctions. Rather, it broadly punishes "[w]hoever embezzles, steals, purloins, or knowingly converts to his use * * *, or without authority * * * disposes of any * * * thing of value of the United States or any department or agency thereof."[2] The trees growing in the C&O Canal National Historic Park were clearly "thing[s] of value" to the United States, not merely because of the value of the timber, but because of the wooded scene the trees made possible. Petitioner's destruction of those trees fell within the scope of Section 641.

In accordance with this language, this Court noted in *Morissette* v. *United States*, 342 U.S. 246 (1952), that "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions."[3] *Id.*

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[2] See, *e.g.*, *United States* v. *Hill*, 835 F.2d 759, 763 (10th Cir. 1987) (Section 641 ("codifi[ed] as one crime with wide parameters trespass to property of the government"); *United States* v. *Croft*, 750 F.2d 1354, 1360 (7th Cir. 1984) (scope of Section 641 broader than common law tort foundation, including, *e.g.*, things of intangible value); *United States* v. *May*, 625 F.2d 186, 190-192 (8th Cir. 1980) (similar); *United States* v. *Girard*, 601 F.2d 69, 70-71 (2d Cir.) (similar), cert. denied, 444 U.S. 871 (1979).

[3] Petitioner misplaces his reliance (Pet. 27) on *Moore* v. *United States*, 160 U.S. 268, 273 (1895), for the proposition that a "thing of value" under Section 641 is narrowly limited to personal property subject to larcency-type offenses at

at 269 n.28. The Court also noted that "[t]he word 'converts' does not appear in any of [§ 641's] predecessors." *Ibid.* Consistently with the district court's jury instruction in this case, the Court later explained (*id.* at 271-272):

> Conversion * * * may be consummated without any intent to keep and without any wrongful taking, where the initial possession by the converter was entirely lawful. Conversion may include misuse or abuse of property. It may reach use in an unauthorized manner or to an unauthorized extent of property placed in one's custody for limited use. * * * It is not difficult to think of intentional and knowing abuses and unauthorized uses of government property that might be knowing conversions but which could not be reached as embezzlement, stealing, or purloining.

Petitioner's act of cutting the trees was a knowing abuse of the government's property for his own benefit and therefore amounted to a conversion within the meaning of Section 641.[4]

2. Contrary to petitioner's contention (Pet. 15-19), the decision of the court of appeals in this case

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common law. The Court in *Moore* was addressing the sufficiency of an indictment charging embezzlement under a predecessor statute. 160 U.S. at 273-274.

[4] There is no merit to petitioner's contention (Pet. 14-15) that the indictment did not charge the offense of conversion of government timber. Count 1 of the indictment charged that petitioner "did knowingly convert, and did without authority, dispose of a thing of value of the United States and of the National Park Service, a department and agency thereof, to wit: 126 trees and saplings, more or less, which had been cut down on lands owned by the United States." Pet. App. 23a.

does not conflict with decisions of the Ninth and Tenth Circuits. In most of the cases on which petitioner relies, the defendants were charged with violating Section 641 by cutting and removing timber from public lands. The principal issue was whether a defendant could be separately charged under 18 U.S.C. 1852 or 1853 for cutting down the timber without improper merger of the offenses; the courts determined that a defendant could be so charged. See *United States* v. *Larsen*, 596 F.2d 410, 411-412 (10th Cir. 1979); *United States* v. *Gemmill*, 535 F.2d 1145, 1149-1150 (9th Cir.), cert. denied, 429 U.S. 982 (1976); *United States* v. *Cedar*, 437 F.2d 1033, 1035-1036 (9th Cir. 1971).[5]

In *Magnolia Motor & Logging Co.* v. *United States*, 264 F.2d 950 (9th Cir.), cert. denied, 361 U.S. 815 (1959), the district court addressed the question whether the stealing and converting of logs, agreed to be the property of the United States, could be punished under Section 641 in light of the fact that it could also be punished under Sections 1852 and 1853. The court asserted that one of the elements distinguishing a Section 641 from a Section 1852 or 1853 offense was that Section 641 applied to personalty, not realty. *United States* v. *Lamb*, 150 F. Supp. 310, 312-314 (N.D. Cal. 1957). The court of appeals, in upholding the conviction, stated that "the cutting and felling of the trees, the making of the logs and the theft and conversion thereof were distinct, separate and independent acts." The court therefore concluded that the logs were personal property. 264 F.2d at

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[5] Although the court in *Gemmill* assumed that carrying away timber constituted a separate Section 641 offense, 535 F.2d at 1150, it did not determine that there could be no Section 641 offense if the timber were not so transported.

954. Thus, the court of appeals simply addresed the sufficiency of the evidence in the context of the common law rule that it was not larceny to sever trees from property and carry them away in one continuous act, but it was larceny if the severance of the trees and their asportation constituted separate acts. See generally 2 W. LaFave & A. Scott, *Substantive Criminal Law* § 8.4, at 349-350 (1986).

While noting that the *Magnolia Motor* decision paid "lip service" to the common law treatment of stolen timber, the Ninth Circuit subsequently has rejected the common law distinction between trees that are severed and carried away in one continuous act and those that are cut and carried away in separate steps. See *United States* v. *Gemmill*, 535 F.2d at 1150. In addition, the court has since upheld a ruling that a defendant can be charged in separate counts under Section 641 for cutting down timber and for removing it, although one of the charges should be dismissed after conviction to avoid a multiplicitous indictment. See *United States* v. *Manes*, 420 F. Supp. 1013, 1017-1019 (D. Or. 1973), aff'd without opinion, 549 F.2d 809 (9th Cir. 1977) (Table). Current Ninth Circuit law therefore suggests that trees have value in place and that cutting the trees can be a form of conversion that violates 18 U.S.C. 641.[6]

The Ninth Circuit has not yet had to define the scope of Section 641 in a case in which the Section 641 conviction concerns wood that is not removed nor

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[6] The other case upon which petitioner relies, *United States* v. *Petersen*, 777 F.2d 482 (9th Cir. 1985), cert. denied, 479 U.S. 843 (1986), is inapposite. That case involved a defendant convicted under Section 641 who exceeded the scope of a contract to cut down diseased trees on public lands by cutting down and removing healthy trees.

one in which the cutting itself affects a value—the scenic quality of the forest—distinct from the value of the trees as timber. The Ninth Circuit's decisions are therefore not in conflict with the Fourth Circuit's decision in this case. In any event, to the extent there is tension in the analysis of the Fourth and Ninth Circuit decisions, the infrequency with which this issue has arisen over the past 30 years demonstrates that it is not of sufficient recurring importance to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

OCTOBER 1990

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